

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

THOMAS & KATHLEEN GARLAND )  
 FAMILY TRUST, *et al.*, )

Plaintiffs, )

vs. )

OLYMPIA FUNDING, INC., a California )  
 corporation, *et al.*, )

Defendants. )

Case No.: 2:15-cv-00758-GMN-GWF

**ORDER**

Pending before the Court is the Motion to Remand (ECF No. 7) filed by Plaintiffs Thomas & Kathleen Garland Family Trust and Courtney Dolan (collectively, “Plaintiffs”). Defendants BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP (“BANA”), The Bank of New York Mellon, as trustee of CWALT, Inc., Alternative Loan Trust A-2004-24CB (“BNYM”), Mortgage Electronic Registration Systems, Inc. (“MERS”), and MERSCORP, Inc. (“MERSCORP”) (collectively, “Defendants”) filed a Response (ECF No. 10), and Plaintiffs filed a Reply (ECF No. 11).

**I. BACKGROUND**

Plaintiff originally filed this action in state court on February 11, 2015. (Compl., ECF No. 1-1). On April 23, 2015, Defendant BNYM removed the action to this Court. (Pet. Removal, ECF No. 1). In its Removal Petition, BNYM asserted that it was served by Plaintiffs with the summons and complaint in this case on March 20, 2015. (*Id.* ¶ 6). Likewise, in its Statement Regarding Removed Action, BNYM reasserted that it was served by Plaintiffs with a copy of the summons and complaint in this case on March 20, 2015. (Stmt. Removal ¶¶ 1–2, ECF No. 6).

1 Defendants filed a Motion to Dismiss, asserting that Plaintiffs' Complaint should be  
2 dismissed for failure to state a claim upon which relief may be granted. (ECF No. 4). Plaintiffs  
3 filed the instant Motion to Remand, asserting that BNYM's removal was untimely. (5:20–6:6,  
4 ECF No. 7).

## 5 **II. LEGAL STANDARD**

6 Defendants may remove a case to the United States District Court that could have been  
7 originally brought there, so long as all defendants consent to removal within thirty days of  
8 being served with the complaint and no defendant who has been joined and served is a forum  
9 resident. *See* 28 U.S.C. § § 1441, 1446. Consent to removal must be unanimous. *Chi., Rock*  
10 *Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900). “[T]he filing of a notice of removal  
11 can be effective without individual consent documents on behalf of each defendant. One  
12 defendant's timely removal notice containing an averment of the other defendants' consent and  
13 signed by an attorney of record is sufficient.” *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d  
14 1208, 1225 (9th Cir. 2009). A defendant must remove within thirty days of being formally  
15 served with the summons and receiving actual notice of the complaint, through service or  
16 otherwise. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347–48 (1999). A  
17 defendant has the burden of proving proper removal by a preponderance of the evidence.  
18 *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106–07 (9th  
19 Cir. 2010).

## 20 **III. DISCUSSION**

21 Based on the assertions made by BNYM in its Petition of Removal and Statement  
22 Regarding Removed Action, BNYM was served by Plaintiff with a copy of the summons and  
23 complaint in this case on March 20, 2015. (Pet. Removal ¶ 6; Stmt. Removal ¶¶ 1–2).  
24 However, BNYM removed to this Court on April 23, 2015—34 days after BNYM was served.  
25 (Pet. Removal). Accordingly, BNYM's removal appears to have not been timely.

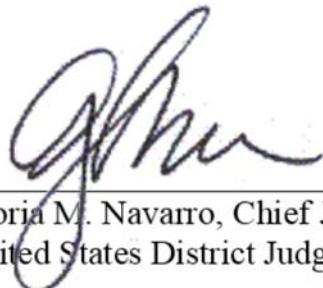
1 However, in its Response to Plaintiffs' Motion to Remand, BNYM makes two  
 2 arguments as to why its removal was, in fact, timely. First, BNYM asserts that Plaintiff's  
 3 service on BNYM was not proper. (Response 3:16–4:7). However, BNYM waived defenses  
 4 relating to insufficiency of Plaintiffs' service of process when it failed to raise such a defense in  
 5 its previously filed Motion to Dismiss. Fed. R. Civ. P. 12(g)(2), 12(h)(1)(A). *See also Schnabel*  
 6 *v. Lui*, 302 F.3d 1023, 1033 (9th Cir. 2002). Accordingly, for purposes of removability,  
 7 BNYM was properly served on March 20, 2015.

8 Second, BNYM asserts that its removal was timely under the "later-served" defendant  
 9 rule. (Response 4:8–25). Under the later-served defendant rule, "each defendant is entitled to  
 10 thirty days to exercise his removal rights after being served." *Destfino v. Reiswig*, 630 F.3d  
 11 952, 956 (9th Cir. 2011). However, "[t]his rule doesn't go so far as to give already-served  
 12 defendants a new thirty-day period to remove whenever a new defendant is served, as that  
 13 could give a defendant more than the statutorily prescribed thirty days to remove." *Id.* Thus,  
 14 BNYM had thirty days to remove from the date it was served by Plaintiffs, and the later dates  
 15 when other defendants, like BANA, were served did not extend BNYM's own April 20, 2015  
 16 removal deadline. Accordingly, because BNYM filed its Notice of Removal after April 20,  
 17 2015, removal was untimely and the Court must remand this case back to state court.

#### 18 **IV. CONCLUSION**

19 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Remand is **GRANTED** and this  
 20 case is hereby remanded to the Eighth Judicial District Court. The Clerk of the Court shall  
 21 remand this case back to state court and thereafter close this Court's case.

22 **DATED** this 10th day of August, 2015.

23  
 24  
 25   
 Gloria M. Navarro, Chief Judge  
 United States District Judge